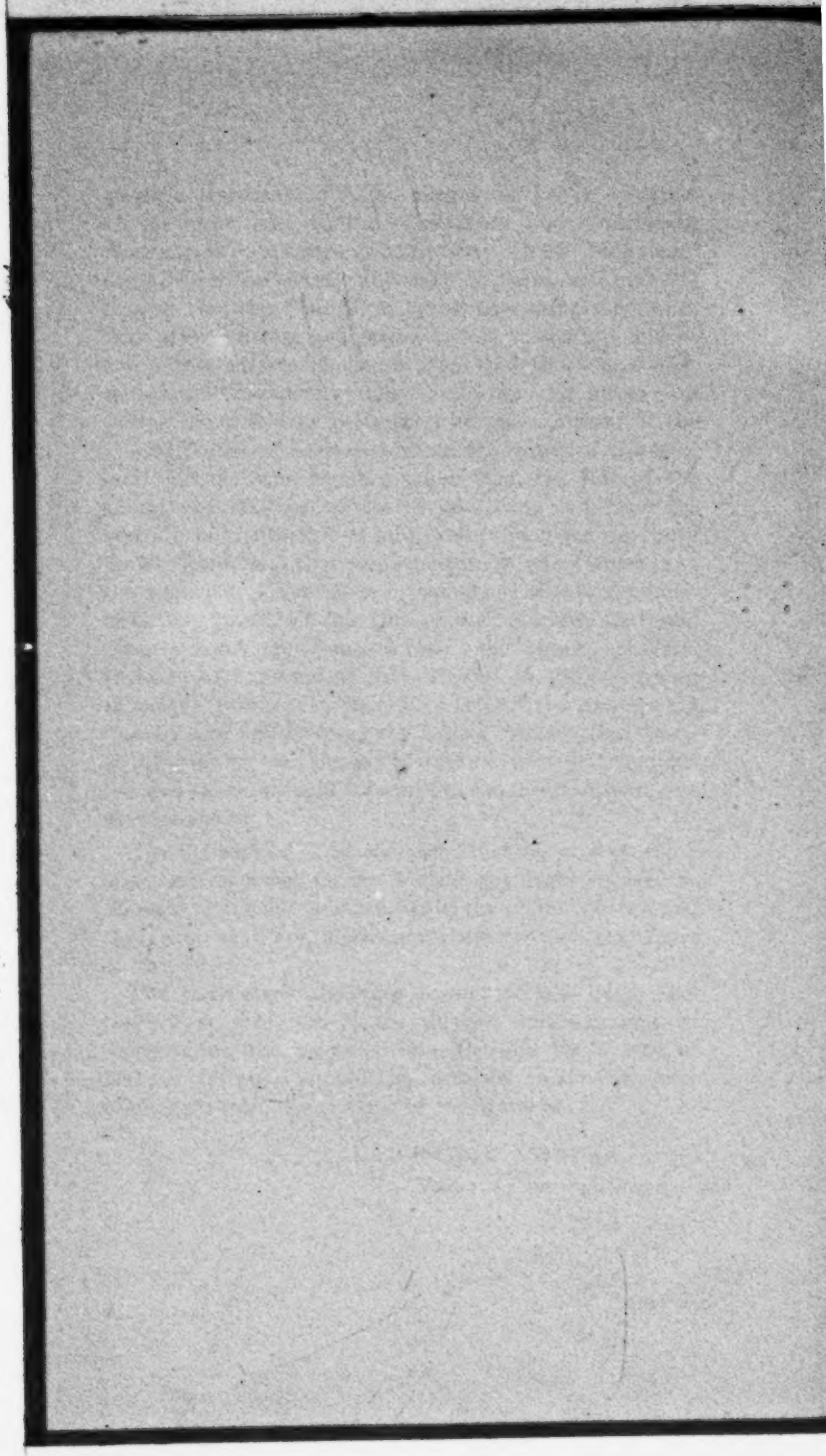


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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 169.

THOMAS M. RIGGINS, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR THE APPELLANT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 18308

(19,616.)

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THE UNITED STATES, APPELLEE.

BRIEF FOR APPELLANT.

Statement.

The indictment contains five counts, varying in form of expression rather than in substantial matter. The alleged offense consists of a conspiracy or combination on the part of the appellant, with other persons, to injure and oppress one Horace Maples, a citizen of the United States of African descent, in the enjoyment of a right, privilege and immunity secured to him under the laws of the United States. The averment is made, substantially, that said Maples was in the legal custody and under the protection of the sheriff of the county of Madison, State of Alabama, aided by the Alabama National Guard, under an indictment charging said Maples with murder, presented by a court of competent jurisdiction of the said county of Madison; that the appellant and others of the alleged combination conspired and banded together for the purpose of forcibly taking the said Maples from the

custody of the lawful officers of the State, and in pursuance of said preconceived plan did forcibly take said Maples from the custody of said officers, and hung him until he was dead; that the conspiracy was so formed, and the purpose and design thereof was executed, because of the race of said Maples, thus denying to him the right to a trial by jury, and to be punished if guilty, or acquitted if innocent. The right of trial by jury, it is averred, being denied to him by reason of his death at the hands of the alleged conspirators, the said Maples was deprived of a privilege and immunity secured to him under the Constitution and laws of the United States.

The indictment, stripped of its prolixity and redundancy, avers that the appellant and others entered into a conspiracy to take Maples, a citizen of African descent, from the State officers, to whose custody he had been lawfully committed under a charge of murder, and to hang him until he was dead, and that said conspiracy was formed and its purpose executed because the said Maples was of African descent.

In ordinary significance, Maples was lynched while in the custody of the State authority under a charge of murder, and the appellant and others are charged by the Federal grand jury with the alleged offense under the idea that the Federal law has been violated.

The appellant, being in the custody of the marshal under a legal commitment, made application to the circuit court for a writ of *habeas corpus* under the provisions of section 754 of the Revised Statutes. The writ was awarded, and on the hearing the prayer of the petition was denied, the writ discharged, and the petitioner remanded to the custody of the marshal, to be held under said indictment and the capias until discharged by due process of law (Record, p. 13). Thereupon the appellant sues out an appeal to this court from the final decision of the circuit court as authorized by section 764 of the Revised Statutes.

The petition for the writ of *habeas corpus* avers that the

indictment charges no offense punishable under the laws of the United States; that the indictment charging the appellant, with others, of entering into a conspiracy to take Maples from the custody of the State officers while under an indictment for murder, and, in furtherance of the combination, to hang him until he was dead, thereby depriving him of a trial by jury, did not show that the appellant violated any right, privilege and immunity secured to said Maples under the Constitution of the United States, or that any Federal law was infracted providing for the punishment of such an alleged offense, and that it does not appear from the indictment that the conspiracy, combination, or confederation therein alleged was formed and entered into through any law of the State of Alabama thereby authorizing said alleged conspiracy, combination, or confederation, or that any law of the State of Alabama authorized its citizens or other persons to enter into a conspiracy to injure, threaten or oppress said Maples, a citizen of the United States of African descent or color, by denying to him, said Maples, a person of African descent, by reason of his race, the right, privilege, and immunity of a trial by jury to determine his guilt or innocence upon an indictment for murder pending against him in the courts of Alabama.

The indictment is preferred under section 5508 of the Revised Statutes:

"If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

The violation of this statute finds additional punishment in section 5509:

"If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed."

Under the laws of Alabama the distinction between accessories before the fact and a principal and between principals in the first and second degree, in cases of felony, is abolished. Section 4308 of the Code of 1896 reads:

"The distinction between accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abolished; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors."

If the appellant has committed any offense, he is guilty of murder under the facts averred. The averment as to the conspiracy, whether it means a mere combination for the accomplishment of the end or an actual participation in the hanging of Maples, would make the offense, under the laws of Alabama, murder in the first degree, punishable by death or life imprisonment. The statutes read as follows:

"Every homicide, perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life,

is murder in the first degree; and every other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree."—Revised Code of 1896, section 4854.

"Any person, who is guilty of murder in the first degree, must, on conviction, suffer death, or imprisonment in the penitentiary for life, at the discretion of the jury; and any person, who is guilty of murder in the second degree, must, on conviction, be imprisoned in the penitentiary for not less than ten years, at the discretion of the jury."—Revised Code of 1896, section 4858.

The following are the assignments of error upon which the appellant relies for the reversal of the judgment of the trial court:

Assignments of Error.

1. The court erred in refusing to grant the prayer of said petition.

2. The court erred in refusing to discharge the petitioner and in remanding him to the custody of the marshal.

3. The court erred in not determining as a matter of law that the indictment—a certified copy of which is annexed to the petition—charged no offense punishable under the laws of the United States.

4. The court erred in determining that the said indictment, charging this defendant with a conspiracy or combination to injure, threaten, and oppress one Horace Maples, a citizen of the United States of African descent and color, in denying the said Horace Maples a trial by jury, charges an offense which is punishable under the laws of the United States.

5. The court erred in refusing to hold that the said indictment charging this defendant with a corspiracy to injure,

threaten, and oppress Horace Maples, a citizen of the United States of African descent and color, in denying him a trial by jury upon an indictment for murder in the courts of Alabama, by hanging him, did not charge any offense cognizable by the courts of the United States or punishable under the laws of the United States.

6. The court erred in holding that said indictment charging this defendant, together with one Robert Powell and others, with entering into a conspiracy to injure, threaten, or oppress Horace Maples, a citizen of the United States of African descent and color, in denying to the said Horace Maples, by reason of his race, a trial by jury upon an indictment in the courts of Alabama, under an indictment for murder, whereby his guilt or innocence might be determined, constituted an offense within the jurisdiction of the courts of the United States or punishable under the laws of the United States.

7. The court erred in holding that the facts set forth in said indictment charged an offense within the jurdiction of the courts of the United States and punishable under the laws of the United States.

8. The court erred in refusing to hold that the facts set forth in said indictment, and in each count thereof, charged an offense punishable only in the courts of the State of Alabama.

THE ARGUMENT.

The inquiry which we meet at the threshold is whether Maples was injured, oppressed, threatened or intiminated in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States by reason of the facts alleged in the several counts of the indictment.

We may inquire, primarily, from what source is the right of the citizen to be held harmless against the violence of a mob derived? He relies upon the law of his State as a shield for his protection, and invokes its strong arm to prevent the commission of any wrong against his person.

The mob is a combination of people whose purpose is not merely to violate the law, but to defy its enforcement according to legal procedure. To prevent a violation of the law, the injured or oppressed citizen is under the protection of the sheriff, the officer designated by the State, and the representative of the majesty of the law, and frequently, as in the case at bar, reinforced by the military power of the State. It is vigorously asserted by the trial court that Maples, being thus under the protection of the State of Alabama, had the constitutional right to be tried by a jury, and that the act of the mob in forcibly taking him from the custody of the sheriff and overriding the military power of the State deprived him of the right to be tried by a jury and convicted if guilty, or acquitted if innocent, and, therefore, a right secured under the Federal Constitution has been denied him, rendering the guilty amenable to punishment under section 5508 of the Revised Statutes.

There is no pretense that the State of Alabama was remiss in the protection it endeavored to afford Maples. He was confined in the county jail, ordinarily safe against escape, as well as all intrusions, and guarded by the military power of the State. The State extends its greatest power to the protection of the prisoner, and there is no suggestion that the State, through any of its departments, was negligent in the performance of any duty it owed its prisoner. The complaint is not for any affirmative act the State has done or could have accomplished, but the violated right is from the individual action of citizens, impelled through a sense of vengeance on account of race prejudice. At once we are confronted with the logical conclusion that the violation of any right possessed by a white man or a negro by members of

the opposing race on account of the difference in race inveighs against the statute and renders the parties liable to prosecution. If this be true, a law more unfortunate could never have been conceived. The breach is wide today between the races in every State in the Union, and probably to a greater extent in those States where the negro is less known, or where his imperfections are not overlooked, rather than in those States where he is apparently unobserved because of his recognized incapacities, influences of heredity, and existing predilections. If every disagreement between the members of the different races constituted a basis of criminal action for the violation of a supposed constitutional right punishable by the Federal courts, the seat of discord and litigation would be immediately transferred to the Federal courts, although it has been constantly the expressed intent to limit rather than increase this jurisdiction.

The violation of a constitutional right of a negro by a negro, or of a white man by a white man, may not be within the statute, but the argument is made, in the opinion of the trial court, that the violation of the constitutional rights of members of one race by those of the other race offends the statute under which the appellant is indicted. This, indeed, is a sad spectacle, in the focalization of power in the Federal courts, where the superior race, the white man, could oppress the inferior race, the negro, through the machinery of the courts, or where the inferior race could bring its grievances for hearing through universal prosecutions, although action among members of the same race for the identical violation of the same right would not be the subject of a passing consideration.

While the negro is the ward of the nation, the Caucasian is the pride and crowning glory of the Republic, for through him it was conceived and created and its destiny forever established. Federal legislature has for its purpose the protection of all of its citizens, regardless of race, and shallow indeed would be the statesmanship of this country to adopt

a system of legislation discriminating in its procedure, or recognize as necessary laws for one race against the other which could not be utilized regardless of race. From whence, then, does the conception arise that the lynching of a member of one race by members of the other race, under a conspiracy, by reason of a prejudice that may exist against the race of the victim, invades the rights of the victim under the Constitution of the United States?

The source of power is suggested by the trial court as the thirteenth and fourteenth amendments to the Constitution.

THE THIRTEENTH AMENDMENT.

The language of the thirteenth article seems clear and its meaning unmistakable:

"Neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to this jurisdiction."

Whether we read this amendment in the light of events then recently occurring or according to the plain words of expression, no error is possible. Those of our citizenship who passed through the fiery and unfortunate ordeal culminating in the adoption of this provision in our Federal Constitution knew its meaning, and no adjudication could have furnished greater emphasis than was universally understood. The student of English idiom would quickly say that it needed no construction—that it meant what it said—that slavery was abolished and involuntary servitude, except for the duly convicted criminal, was forever prohibited.

Of whatever school of doctrine the citizen belonged, as to the relation of the States to the United States and the respective reserved and granted powers, agony and grief was carried into every household, during the period of four years or more of horror, to settle the question of the continued existence or the abolition of slavery. The warning procla-

mation of September 22, 1862, was the first act, national in character, to assist in the construction of the amendment. Following was the emancipation proclamation of January 1, 1863, declaring:

"That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves, within any State, or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free. * * *

"Now, therefore, I, Abraham Lincoln, President of the United States, by virtue of the power in me vested, as Commander-in-chief of the Army and Navy of the United States, in time of actual armed rebellion against the authority and Government of the United States and as a fit and necessary war measure for suppressing said rebellion, * * * And, by virtue of the power, and for the purpose, aforesaid, I do order and declare, that all persons held as slaves, within said designated States, and parts of States, are, and henceforward shall be free, and that the executive Government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons. * * * And, I further declare and make known that such persons of suitable condition will be received into the armed service of the United States, to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.

"And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind and the gracious favor of Almighty God."

It is stated by Nicolay and Hay, the biographers of Mr. Lincoln, that—

"Fame is due Mr. Lincoln, not alone because he decreed emancipation, but because events so shaped themselves under his guidance as to render the conception practical and the decree successful. Among the agencies he employed none proved more admirable or more powerful than this two-edged sword of the final proclamation, blending sentiment with *force*, leaguing liberty with union, *filling the voting armies at home and the fighting armies in the field.* In

the light of history we can see that by this edict Mr. Lincoln gave slavery its vital thrust, its mortal wound. It was the word of decision, the judgment without appeal, the sentence of doom."

The proclamation was absolute and obvious, that all persons thenceforward should be forever free, although an expression of belief was deemed necessary, that it was "warranted by the Constitution upon military necessity." The absence of affirmatively expressed power in the fundamental law possibly caused the biographers to style the proclamation an "edict" (quite unusual in English nomenclature), the word of decision, the judgment without appeal, the sentence of doom.

The proclamation served its intended purpose. By instantaneous transition all slaves were thereafter to be treated and accepted as freemen. The evolution from bondage to citizenship in the spectacular became transcendent, overleaping any like event in historical annals. Many slaves grasped the invitation of the proclamation and enlisted in the army of the United States and stood in battle array against their former masterhood. This panorama, as wonderful in imagery as it is true in fact, is epitomized by the bronze memorial, in *bas relief*, erected on Boston commons, commemorative of the enlistment of one hundred and sixty-eight thousand former slaves, evidencing the culmination of the dramatic era.

Following these events, scarcely more than two years intervening, this amendment was proposed on the first day of February, 1865, and its adoption was declared on the 18th day of December, 1865, before the final cessation of hostilities was officially determined, on the 20th day of August, 1866.

United States *vs.* Anderson, 9 Wallace, 56 (71).
Levy *vs.* Stewart, 11 Wallace, 244 (253).

The abolition of slavery, therefore, became complete before peace in a legal sense prevailed throughout the land. Reading this amendment in the light of these events and according to the recognized purpose of its foundation, it simply abolished slavery as an American institution, and forever prohibited involuntary servitude, except as a punishment for crime.

The writer cannot believe that Mr. Lincoln in his proclamation, or the framers of the amendment in establishing universal freedom and prohibiting involuntary servitude through the amendment, intended to bring within its grip the individual acts of the citizens arising from differences or enmities among the members of the races. The amendment simply placed every citizen upon an equal footing, and meant personal freedom to every one. There was no effort at race arraignment. The status was established, and the rights of the citizen were left subject to existing laws. The argument in the Civil Rights Case, 109 U. S., 3, is so clear that it would seem conclusive that the indictment makes no charge against the appellant incident to slavery or involuntary servitude. The court tells us that the amendment "simply abolished slavery," and that it "has respect, not to distinctions of race or color, but to slavery." The court further say:

"When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the process of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."

What form, phase, element, or condition of slavery or involuntary servitude involved Maples when he was hung and put to death by the mob? We may assume that he knew nothing of slavery or servitude—the subject of constitutional

law. Born years after the adoption of the amendment, he was a citizen of the United States, having equal rights and privileges with every other man, without regard to race or color. The day he was born he attained the degree of citizenship in the progress of the elevation of his race. He was not a special favorite of the law any more than the Caucasian of highest blood born during the same period.

We submit under no rule of construction can we properly reach the conclusion that an assault upon a citizen of African descent by a white person, with whatever violence, involves a species of slavery or form of involuntary servitude.

In United States vs. Harris, 106 U. S., 629 (643), it is said:

"If, therefore, we hold that section 5519 is warranted by the thirteenth amendment, we should, by virtue of that amendment, accord to Congress the power to punish every crime by which the right of any person to life, property or reputation is invaded. Thus, under a provision of the Constitution, which simply abolished slavery and involuntary servitude, we should, with few exceptions, invest Congress with power over the whole catalogue of crimes."

Section 5519 being eliminated from all consideration, it is claimed that the acts averred are within the amendment, and are punishable under the first clause of section 5508, providing:

"If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

These words may have the broadest significance, but surely can have no application to a provision simply abolishing slavery or involuntary servitude. There was no effort to return Maples to the condition of negroes in the slave-holding period. Under the averment, the mob had the intention to destroy life, to murder, not to preserve life in order that service, without consent, might be obtained.

It is claimed by the trial court that the lynching of Maples constituted the denial of a right secured to him under the fourteenth amendment.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This amendment has so often come under discussion that it would seem surprising, in view of the numerous declarations of this court, for the contention to be made that the acts of individuals in the infliction of a personal injury denied to the victim any constitutional right, or that it invaded his right to an equal protection of the law.

The purpose of the amendment has been so often reiterated that it must be accepted as finally settled that the design was to annul all State legislation, existing or attempted to be created, discriminating against the colored race in the rights incidental to citizenship.

Being prohibitory of adverse State action through any of its departments, the primary inquiry arises, What has the State done whereby any right of Maples was denied or abridged? Maples was a prisoner in charge of the legal custodian and under his protection. In the effort to shield him the Alabama National Guard was present to assist in the protection of Maples. The civil and military power of the State therefore endeavors to maintain the law and defend the prisoner. If the entire force of the State is physically overcome by the conspiring mob, has the State failed to perform any duty it owed the prisoner?

In the Slaughter-house cases it is said that the existence of laws in the States where the newly emancipated negroes resided which discriminated with gross injustice and hardship against them as a class was the evil to be remedied, and by the amendment such laws were forbidden.

In *Ex parte* Virginia, 100 U. S., 339 (346), it is said:

"The prohibitions of the fourteenth amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether the action be executive, legislative or judicial."

The State, as a political governmental division, through any of its agencies or instrumentalities, is prohibited from passing or enforcing any law abridging the privileges or immunities of the citizen. The nature and character of the offensive legislation has been frequently pointed out by the court, and this legislation and the enforcement of it is the subject of condemnation. The first eleven amendments were restrictive of Federal power. The thirteenth amendment was declaratory of a condition which thereafter must never exist, vesting in Congress the affirmative power to adopt legislation necessary for its proper enforcement, and, therefore, it was an enlargement of Federal power. The fourteenth amendment asserts power in the United States, as distinguished from the reserved power of the States, and its language, read in the light of the first eleven amendments, gives emphasis to the conclusion that it was directed against the action of the States, and not against the action of individuals.

This court, in Strauder *vs.* West Virginia, 100 U. S., 303 (107), quotes approvingly the language used in the Slaughter-house cases:

"The existence of laws in the States where the newly emancipated negroes reside, which discriminated with gross injustice and hardship against them as a class, was

the evil to be remedied, and by it, (the fourteenth amendment) *such laws* were forbidden. * * * We doubt very much whether *any action of a State*, not directed by way of discrimination against the negroes, as a class, will ever be held to come within the purview of this provision."

This opinion means, what it better expresses, that there shall be no legislation discriminating between the races. The purpose is to lift the negro, in a legal sense, to the superior altitude of the white race. The ascendency of the white man is everywhere recognized, and the effort is to bring the negro, in the course of time, to this elevation by prohibiting the exercise of any State power that will prevent him from the enjoyment of the same legal rights.

The well-understood doctrine is aptly stated in Virginia vs. Rives, 100 U. S., 313 (318):

"The provisions of the fourteenth amendment of the Constitution we have quoted, all have reference to State action exclusively, *and not to any action of private individuals.* It is the State which is prohibited from denying to any person within its jurisdiction, the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights."

The Civil Rights cases, 109 U. S., 3, decided October 15, 1883, announced a doctrine of construction which has remained unshaken. During this period of more than twenty years it has not been supposed that mob violence, however serious and condemnable, violated any right of the citizen secured to him under this amendment, except as attempted under the unconstitutional section 5519, until we are confronted with the indictment in this cause. In every section of the country which is inhabited to any appreciable degree by the negro there have been many unfortunate clashes between the races. In a number of instances the mob spirit, dominated by the white race, has prevailed and the negro

has been the victim. Whether this fact be illustrated by the horrible affair, resulting in murder, at Statesboro, Georgia, or the widespread destruction at Springfield, Ohio, resulting in arson, the condition is the same. Yet the ultraist has never contended that this race prejudice and the consequent act, if such it be, violated the privileges and immunities secured to the negro under the Federal Constitution. No State has any law or has attempted any legislation or the exercise of any power through any of its departments of administration encouraging the unlawful act of any combination of people in putting to death any citizen. It must be clear that, unless there has been some such action on the part of the State, there has been no invasion of the amendment.

"It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It multiplies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property, without due process of law, or which denies to any of them, the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. * * * Positive rights and privileges are undoubtedly secured by the fourteenth amendment, but they are secured by way of prohibition against State laws and State proceedings affecting these rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect, and such legislation must necessarily be predicated upon such supposed State laws of State

proceedings, and be directed to the correction of their operation and effect."

Civil Rights case, 109 U. S., p. 3 (11).

The court in this cause further say:

"Until some State law has been passed or some State action through its officers or agents has been, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States, under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority. In fine, the legislation which Congress is authorized to adopt in this behalf, is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for constructing such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, in such acts and proceedings as the States may commit or make, and, which, by the amendment, they are prohibited from committing or taking."

We may make the inquiry, Why have not the Federal courts, during this long period of intervening years prosecuted the parties who, through the combination of numbers and physical power, have in many sections of the country committed murder or crime? A mob moves independent of all law—it is the creature of revenge, born in anarchy and nurtured by disorder. A combination of men formed to overthrow the administration of government, in a special case, and execute violence upon the citizen, under the protection of State authority, is a mob; but none can conceive that it had its origion in State law, which it defied. This would be the reply to the inquiry, but it is more comprehensively answered in the Civil Rights case (p. 17):

"An individual may commit an assult against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of State law, or

State authority, he cannot destroy or injure the right, he will only render himself amenable to satisfaction or punishment, and, amenable therefore to the laws of the State, where the wrongful acts are committed."

The amendment does not abrogate the fundamental right of the State to protect its citizens in the enjoyment of life, liberty, and property. On the contrary, it recognizes the correlative duty of the State to extend this protection to its citizens. This is State sovereignty, and without it the right of protection, in the State, to its citizens could never exist. If the States, in their reserved powers, were by this amendment deprived of the power and duty of affording protection to their citizens, the force and effect of the earlier provisions of the Constitution would be destroyed. The amendment, therefore, does not destroy the power of the State to protect its citizens in the full enjoyment of life, liberty and property, and this right, being among the reserved powers of the States, it must follow that the trial and punishment of the person, or persons, or combination of persons inflicting injury to life, liberty, or property of other citizens is within the jurisdiction of the State courts, and there it can only reside. This court, in the Cruikshank case, 93 U. S., 542 (553), is authority for this view:

"Sovereignty, for this purpose, rests alone with the States."

And the court, leaving no place for argument, states in forceful terms the accepted interpretation of the Constitution (p. 555):

"Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The

power of the National Government is limited to the enforcement of this guaranty."

Also:

Scott *vs.* McNeal, 154 U. S., 34 (45).
Neal *vs.* Delaware, 103 U. S., 370 (397).
Pace *vs.* Alabama, 106 U. S., 583.
United States *vs.* Harris, 106 U. S., 629.
West *vs.* Louisiana, 194 U. S., 258.
Giozza *vs.* Tiernan, 148 U. S., 657.

We are unable to reconcile the opinion of the trial court with the frequently announced views of this court. It does not seem possible to overturn the argument of this court that the prohibition is against State action only, for, indeed, the language of the amendment, in the use of such explicit language, would necessarily create the limitation. Quoting from the opinion of the trial court, it is said:

"The fact that the State was without fault and endeavoring to do its duty, is not, however, at all conclusive of power of Congress to legislate under that amendment, and is material only in determining the channels in which that power may be exercised."

This suggestion may be unnecessary in the consideration of this cause, yet it is so inconsistent with our views that we cannot permit it to pass unchallenged. Primarily, we submit that Congress has not legislated on the subject. The gravamen of the charge against the appellant is not founded upon any act of Congress, but upon the supposed underlying idea that the right to be tried by a jury is a right secured to him under the Constitution and laws of the United States, and that a denial of this right by an individual or combination of persons violates the intent of the amendment.

If the State has performed its "duty" to the citizen, in that it has passed no law inhibiting the amendment, and is wholly without fault in the alleged denial of any constitutional right of the citizen, may we inquire what would be

the character of the legislation which Congress could pass? It must be clear that the power of Congress to legislate is limited to the action of the States in denying the constitutional rights of the citizen.

The effort of the individual to usurp the power of the State in the punishment of the criminal, by taking unto himself the person of the criminal and infliction of an injury upon him without an opportunity to be heard according to the rules of law, does not in any sense show any action on the part of the State to defeat the right of the citizen. The logic of the proposition makes the State responsible for the criminal act, while its entire power is directed to the maintenance of the law in securing the right to the citizen. If such a condition were possible, the amendment would have served a better purpose by a prohibition against the act of the individual in terms and remaining silent as to State action.

In this connection it may be noticed that at the first session of the 57th Congress, December 9, 1901, Mr. Hoar introduced in the Senate bill No. 1117, and that Mr. Moody, at the same session, and on December 10, 1901, introduced in the House bill No. 4572. These bills were for the protection of citizens of the United States against lynching, in default of protection by the State, and were referred to the respective judiciary committees. The first section of each bill reads:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the putting to death within any State of a citizen of the United States by a mob or riotous assemblage of three or more persons openly acting in concert in violation of law, and in default of protection of such citizen by such State or the officers thereof, shall be deemed a denial to such citizen by such State of the equal protection of the laws and a violation of the peace of the United States and an offense against the same."

We are advised that the bills were never reported, and we may assume that the committees, composed of eminent lawyers, after due investigation determined that the bills were without constitutional parentage. The effort was there made to declare the crime of putting to death by a mob assemblage, in default of State protection, as a denial to the citizen "by such State" of the equal protection of the laws.

The indictment in the case at bar seeks, without the aid of any statute, to define, declare, and punish lynchings, or mob violence, as a denial by the State of a constitutional right of the victim. If the amendment is self-assertive and self-executing, instead of being corrective in purpose, legislation would be unnecessary; and so it could not be controverted that if the Senate and House bills introducted at the 57th Congress were unconstitutional measures, that the present indictment charges the violation of no right secured to the citizen under the amendment.

If a mob composed of white persons inflicted an injury upon a white person, or if a mob of negroes injure a negro, would it be urged that a constitutional right of the victim had been violated—that the State was guilty of a wrong by offensive action? If the difference is because the victim and the conspirators belong to opposing races, logically the question is one of race prejudice instead of the criminal physical injury and the conspiracy to inflict it. In the trial of the issue the murder, arson, or other like crime would be merely incidental to the greater issue, whether there existed race prejudice, a question exclusively for the jury. If we thus reach the idea of race prejudice, so prominent in the indictment, and manifestly of all necessary importance in sustaining the charge, we are amid further difficulties should it be doubtful as to the blood or caste of the victim. In developing the case, assuming an offense is charged, we must inquire whether the blood is sufficiently tainted to remove him from the Caucasian into the negro realm, although the shade of difference is of microscopic nicety; then we in

quire whether race prejudice existed, followed by the next inquiry, whether a conspiracy existed on this specific account, and, lastly, whether a murder was committed. The framers of a constitution, the fundamental law of the greatest of all nations, cannot be supposed to have had in purpose the consideration of such possibilities, which are essential to the life of the indictment, if it charges the denial of a right to the citizen which they sought to protect.

Much is said relative to the denial of a right secured to the citizen. What right of the victim, Maples, is affected by the acts of the conspiring mob which forcibly took him from the custody of the sheriff, who held him under a charge of murder? The indictment charges that these acts were done by the mob "in order that the said Horace Maples might be deprived of the right, privilege, and immunity secured to him under the constitution of the State of Alabama in accordance with and in the manner prescribed by the laws of the State of Alabama."

The laws of Alabama prescribe one method only for the trial of a person under a charge of murder. Maples could only have been legally tried and acquitted, if innocent, or punished, if guilty, by a jury of his peers. The denial of due process of law, of which complaint is made, is the denial of the right to be tried by a jury in the court having jurisdiction as provided by the laws of the State. The amendment, as we understand, has no reference to State procedure in the method of trial, and there is nothing restrictive of the forms of trial which may prevail in a State. An indictment by a grand jury dispensed with by the State law invades no right under the Constitution. A petit jury of any number, instead of the common law twelve in number, is valid, and this is true whether it relates to a part or to the entire State. The whole subject is matter of State requirement, with the amendment has no concern.

This court in an exhaustive discussion of the subject has

announced that trial by jury has never been affirmed to be a necessary requisite of due process of law.

Maxwell *vs.* Dow, 176 U. S., 681 (603).

But it is urged that although the State in dispensing with a trial by jury violates no right of the citizen under the Federal Constitution, yet, the State having provided a system of trial by jury, the prevention of its exercise by an individual or combination of persons operates as a denial of due process of law. It must be without doubt that if the State is under no duty to provide a trial by jury that the failure of jury trial for any reason violates no constitutional right of the citizen.

Hurtado *vs.* California, 110 U. S., 516.
Brown *vs.* New Jersey, 175 U. S., 172.
Bolln *vs.* Nebraska, 176 U. S., 83.
Maxwell *vs.* Dow, 176 U. S., 581.
McNulty *vs.* California, 149 U. S., 645.
Giozza *vs.* Tiernan, 148 U. S., 657.

In Missouri *vs.* Lewis, 101 U. S., 22 (31), the rule is tersely expressed:

"The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the fourteenth amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State.

Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies."

In the construction of a statute we look to its purpose and intent to ascertain what is meant when it is not fully expressed. Thus we learn what matter is implied. The express language of the amendment is clear, and whatever may exist by way of implication we can only find by first ascertaining the purpose for which the amendment was created. As we have seen, this purpose was to secure to all citizens an equal protection of the laws and to prohibit any effort on the part of the States in adopting laws abridging the privileges and immunities of the citizen, and therefore, in searching for matter of implication, we inquire whether the State is prohibited from doing anything which it would otherwise have the right to do. We cannot suppose that the State would undertake, by affirmative action, to accomplish an impossible task. We further learn from this court that the amendment had no reference to the acts of individuals; it deals with States, denying the rights of the individual. If the State is overpowered, overawed, and overwhelmed by the force of numbers, or keen strategy, when attempting to endow the citizen with every right he desires to claim, must it be said, by way of implication, that the amendment meant if anarchy prevailed the State was recreant in its duty towards the citizen? The physical inability to accomplish any object has never been construed as an affimative declaration that it was an effort to deny the right which was at the time sought to be enforced. There can be no pretense that the State is not abundantly equipped with the power to punish the conspiring mob, and that the

State has made an honest effort to bring each of them to justice.

It is the duty of the State to afford to the citizen due process of law as one of its reserved powers, but it is not an imperative demand made upon the States for affirmative action. In Logan's case, 144 U. S., 263 (289), the opinion of Mr. Justice Bradley, in United States *vs.* Cruikshank, 1 Woods, 308, is quoted approvingly:

"When any of these rights and privileges are secured in the Constitution of the United States only by a declaration that the State, or the United States shall not violate or abridge them, it is at once understood, that they are not created or conferred by the Constitution, but that they shall not be impaired by the State, or the United States, as the case may be. The fulfilment of this guaranty by the United States is the only duty with which that Government is charged. The *affirmative enforcement* of the rights and privileges themselves, unless something more is expressed, *does not devolve upon it, but belongs to the State government as a part of its residuary sovereignty.*"

The amendment, therefore, only prohibits the State from denying to her citizens due process of law, should an effort be made to abridge these rights; and, if the State takes no action, through the agency of her departments, the inhibited power has no part to play in the drama. The usurper who temporarily suspends the power of the State by overwhelming the officers in the attempt to exalt the law, affording to the citizen due process of law and an equal protection of the laws, is not thereby clothed with quasi-statehood, nor does he succeed to the duties of the State. The usurpation of power never becomes rightful, rendering the legally constituted authority responsible for its derelictions of duty or the violations of government rule. The anarchist, with his sputtering fuse and bomb, may momentarily put to flight the police power, yet the municipal or other government does not accept the breach of order as a maintenance of the

law it desires to enforce. If the acts of the mob, the usurper, or the anarchist assume a semi-sovereignty, displacing the State in the exercise temporarily of its governmental functions, mean that the State, an integral part of the union of States—of the United States—has abridged the privileges and immunities of the citizens, we reach a startling and unwarranted conclusion. The trial judge sets forth at length in an able discussion the well-recognized and axiomatic truths demonstrating that the States are prohibited from depriving any person of life, liberty, or property without due process, but we submit that the illogical conclusion is drawn that the citizen is denied due process of law by the State when the State is overpowered in the effort of supreme administration and righteous obedience to the demands of the citizen on its protecting power.

In a recent paper read before the Alabama Bar Association the distinguished judge emphasizes his view, and says:

"When lawless violence of private individuals strikes down the helping hands of the State, while it is endeavoring to afford the right, is not the citizen, in the most liberal sense deprived of his enjoyment of judicial procedure, at the hands of the State?"

There can be only one answer to this inquiry, unless we misconceive wholly the adjudications of this court, the purpose of the amendment, and the conditions which provoked and created it. The citizen may, by such lawless acts, by an overpowering conspiracy of individuals, be deprived of his enjoyment of judicial procedure, but not "at the hands of the State." The State in the full realization of its duty passes no offending law, puts into action the entire machinery of its government for the preservation of order, affording to the accused every facility for a fair and impartial trial every remedy which could be sought or expected, yet the lawless acts are done, the murder is committed—"at the hands of the State?" Surely not! This must be an error,

otherwise the mature words of this court, weighed and balanced, reducing the construction of the amendment to its final and only determinable analysis in the great Cruikshank case, are meaningless, when it is plainly announced, after a most thorough and exhaustive consideration, and in absolute consciousness of its importance and the far-reaching effect to be produced, that it is no more the duty or within the power of the United States to punish for a conspiracy to murder within a State than it would be to punish for murder itself.

Instead of attempting to lay this indictment under section 5508, it would, doubtless, have been preferred under section 5519, if it had not been declared unconstitutional.

United States vs. Harris, 106 U. S., 629.

Congress attempted to put the amendment into operative effect by the passage of the act approved April 20, 1891, from which section 5519 was carved. This statute was designed to meet cases of the present character. It provides:

"If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons, of the equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory the equal protection of the laws, each of said persons shall be punished, * * * by fine or imprisonment."

The end sought by this statute is the same effort that is made by the prosecution under this indictment. We may assume, as a logical sequence, that if the statute violated a constitutional law, that the charge in the indictment, unaided by any statute defining the criminal act, must likewise fall for the want of constitutional authority. In order to sustain the indictment as a charge violating a constitutional right, we must read into or engraft upon the averment employed the words of section 5519

"for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory, the equal protection of the laws."

The averment of denial of "due process of law" in addition to "equal protection of the laws" is immaterial as matter of averment, the principle being the same.

The case of United States *vs.* Harris, *supra*, in comparative review leaves no material constitutional question unsettled in this cause. The indictment charged the defendant and others with conspiring to deprive Robert R. Smith and others, citizens of the United States, of the equal protection of the laws in this, that said Smith and others were in the custody of the deputy sheriff, the lawfully constituted State authority, charged with a criminal offense against the laws of the State, and that said Smith and others were deprived of an equal protection under the law, by the defendant and others, while so under arrest, and that they were beaten, bruised, maimed, and otherwise ill-treated by the alleged conspirators. The question was whether Federal jurisdiction existed for the punishment of the mob, alleged to have been composed of the defendant and others, who, with violence, took from the custody of the State authorities prisoners under legal arrest, and by beating and wounding them deprived them of the equal protection of the laws. The court tells us that the only way in which one private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder; and we may say that this principle is not altered by the fact that two or more persons are the offenders. The judgment of this court in the Harris case necessarily settles any question arising in the case at bar, whether relative to a denial of due process of law or of an equal protection to the laws. The words of the court are

clear, comprehensive, and unmistakable, when it is said (p. 639):

"The language of the amendment does not leave this subject in doubt. When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprved any person of life, liberty or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

We may challenge refutation that the State of Alabama measures full to the standard here outlined. No complaint of State dereliction arises. Its laws are ample, and its protection as nearly perfect as a government can offer. No criticism can be successfully urged that any law now existing is obnoxious to the amendment. The trend of legislation is within constitutional limits, and the attacks which have been made upon it have been signally vanquished. Likewise are these State laws sufficient to punish the offenders. The denial of the due process of law cannot logically or as a matter of fact be said to exist for the reason the State does not overcome or successfully resist the virulent mob in wresting the prisoner from the clutches of violence. The effort is made to protect or to rescue by the State authorities, fortified by its military, and this ineffectual effort is pronounced a denial of due process of law.

This result, we submit, is not within the range of construction, and certainly the amendment does not, nevertheless, impose the duty nor confer the power upon Congress to intervene by requiring the State to accomplish something outside of governmental power.

The case of Logan *vs.* United States, 144 U. S., 263, gives

no support to the indictment in the case at bar. Quite to the contrary, it recognizes the principle for which we contend, and is in accord with the Cruikshank and Harris cases.

The question in the Logan case was whether the right of a citizen of the United States in the custody of a United States marshal under a lawful commitment to answer for an offense against the United States to be protected against lawless violence is a right secured to him by the Constitution or laws of the United States, or whether it was a right which can be vindicated only under the laws of the several States, and materially different it is from the contention set up by the prosecution that it is the right of the citizen under the Constitution and laws of the United States to be protected against lawless violence when in custody of State officials for the violation of State laws. The Federal court has the power to protect its prisoners and to maintain the dignity of its process. A court impotent to afford protection to its suitors and witnesses or punish the violators of the law within its jurisdiction would be an organization as unique in character as it would be ineffectual in execution. The victims forcibly taken from the custody of the marshal while held under legal process from the Federal jurisdiction charged with the violation of Federal law were entitled to the protection of the court as a right secured to them under the laws of the United States, and this is the principle decided. The case does not conflict with the Harris case, holding that the Federal court is without jurisdiction to hear and determine the guilt or innocence of conspirators or combination of men charged with the offense of violently seizing a State prisoner in the custody of the State under a commitment from a court of the State for the violation of a State law.

Is not this the proposition now before the court? Wherein does it differ in matter of fact or in principle of law? The Cruikshank case was accepted as a final adjudication until

the futile effort was made under section 5519 in the Harris case, therein declared unconstitutional, the offense being a violation of State law.

This court, in Logan's case, *supra*, reaffirming the principles announced in the Cruikshank case, based upon section 5508, states the point of decision so clearly that further argument is unnecessary to show that the indictment charges the violation of no Federal law involving any right to due process of law or of an equal protection of the law. It is said, page 287:

"It was held that a conspiracy of individuals to injure, oppress and intimidate citizens of the United States, with intent to deprive them of life and liberty without due process of law, did not come within the statute, nor under the power of Congress, because the rights of life and liberty were not granted by the Constitution, but were natural and inalienable rights of man; and that the fourteenth amendment of the Constitution declaring that no State shall deprive any person of life, liberty or property, without due process of law, added nothing to the rights of one citizen as against another, but simply furnished an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. It was of these fundamental rights of life and liberty, not created by or dependent on the Constitution, that the court said: 'Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for conspiracy to falsely imprison or murder within the State, than it would be to punish for false imprisonment or murder itself.'"

Judge Brannon, of the supreme court of West Virginia, concludes a discussion of the subject in forceful terms, and according to the well-nigh universally accepted view of the legal profession:

"The criminal jurisprudence was never granted to the nation, and is left to the States, both because never granted away, and because of amendment ten, saying that all powers, not granted to the nation are reserved to the States.

"It is hardly necessary to say that the amendment does not touch the case of the individual, or mob murder, as it deals, not with acts of individuals, but only with action by the State, through its constituted authorities. Such murders by individuals or mobs, are to be dealt with only by the States."

Brannon's Fourteenth Amendment, p. 108.

As we have seen, the State is clothed with ample jurisdiction for the punishment of murder, whether the guilty be an accessory before the fact or a principal in the first or second degree or a conspirator, by whatever name he may be designated. This jurisdiction was originally retained by the State where it has since always resided, and it clearly appears that this reserved power under the tenth amendment is prohibitive of political legislation in the centralization of the Federal criminal jurisdiction.

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